In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1660

ISADORE SHADLETSKY, a/k/a BUDDY SHAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly admitted in evidence the record of petitioner's prior conviction on a guilty plea, where the judgment did not recite that the plea was voluntary or that petitioner had been advised of the maximum penalty for the offense.

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of having conducted a retail liquor business without having paid the required federal tax, in violation of 26 U.S.C. 5691(a). He was sentenced to a term of one year's imprisonment (suspended except for 30 days) and two years' probation, and fined $1000. The court of appeals affirmed (Pet. App. A-2).

The testimony at trial showed that petitioner operated an after-hours "bottle club" in Florida, at which he dispensed alcoholic beverages without having purchased

the federal tax stamp required by 26 U.S.C. 5121. During the trial, the Assistant United States Attorney advised the court and opposing counsel of his intention to introduce into evidence a record of a prior state court conviction for the unlicensed sale of alcoholic beverages, "in order to show that this offense was committed knowingly and with a specific intent" (Tr. 42).

The state court judgment was entered upon petitioner's plea of guilty and recited that petitioner had appeared with counsel. Petitioner's counsel at trial nevertheless objected to the introduction of the evidence on the ground that the judgment failed to show upon its face whether petitioner had been advised of the maximum penalty for the offense prior to pleading guilty, and failed to show that the plea was voluntary (Tr. 46). After further discussion (Tr. 266-268), the court expressed the view that an authenticated judgment is presumptively valid and asked petitioner's counsel if he wished to present a collateral attack on the state conviction. Counsel contended that he had no burden to do so upon a silent record (Tr. 268-269). After the court ruled it admissible, the judgment of petitioner's prior conviction was read to the jury (Tr. 272, 277-279).

Relying principally upon *Burgett* v. *Texas*, 389 U.S. 109, petitioner contends that whenever the record of a prior conviction is silent with respect to the voluntariness of a guilty plea, the conviction is presumptively void, and the prosecution must affirmatively demonstrate the regularity of the prior proceedings before being permitted to place the judgment in evidence.

Burgett, however, lends no support to petitioner's assertion. There, the record of the prior conviction on its face raised "a presumption that petitioner was denied his right to counsel * * * and therefore that his conviction

was void." *Burgett* v. *Texas, supra*, 389 U.S. at 114. Here, there is no doubt that petitioner had the advice of counsel, since the unrebuted record of his state conviction so indicates. In these circumstances, the prior judgment satisfies the *Burgett* test. See *Bates* v. *Nelson*, 333 F. Supp. 896, 901 (N.D. Cal.). The fact that counsel was present, coupled with the presumption of regularity in court proceedings, serves to rebut any adverse inference to be drawn from a silent record. Cf. *Wilson* v. *Wiman*, 386 F. 2d 968, 969 (C.A. 6), certiorari denied, 390 U.S. 1042.

Moreover, we note that petitioner does not allege the *actual* invalidity of his state conviction, but relies wholly upon what he perceives to be the government's burden of proof. Petitioner has not contended that he was unaware of the maximum penalty for his offense, or that he was induced by improper means to enter his plea of guilty. When a defendant fails to offer facts that cast doubt upon the validity of a prior judgment, the presumption of regularity is not overcome. See *Forthoffer* v. *Swope*, 103 F. 2d 707, 710-711 (C.A. 9). Petitioner's claim that the government must support the validity of his prior conviction is frivolous in view of his failure to mount a collateral attack on that judgment or even to allege its irregularity.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.